Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1812

R. F. SHAFFER, et al.,

Defendants-Appellants,

—against—

ARNOLD HEITNER, as Custodian for
MARK ANDREW HEITNER,

Plaintiff-Appellee.

ON APPAEL FROM THE SUPREME COURT OF THE
STATE OF DELAWARE

MOTION TO DISMISS AND/OR TO AFFIRM

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INDEX

PAGE

Table of Authorities i

Motion to Dismiss and/or to Affirm 1

Question Presented 1

Addition to Appellants' Statement of the Case 2

ARGUMENT 3

Appellants Raise No Substantial Question and the Decision Below Is Clearly Correct 3

A. This Case Presents an "Extraordinary Situation" 3

B. Pre-Seizure Safeguards are Present 5

C. Post-Seizure Safeguards are Present 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 3

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 3, 4

Carey v. *Sugar*, —— U.S. ——, 44 L.W. 4416 (March 25, 1976) 7

Fuentes v. *Shevin*, 407 U.S. 67 (1972) 3, 5, 5, 6, 7

Garcia v. *Krausse*, 380 F. Supp. 1254 (S.D. Tex. 1974).. 4, 5

PAGE

Gordon v. *Michel*, 297 A.2d 420 (Del. Ch. 1972) 4, 5

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 9

Lebowitz v. *Forbes Leasing & Finance Corp.*, 456 F.2d 979 (3d Cir. 1972) 5

Mitchell v. *W. T. Grant Co.*, 416 U.S. 600 (1974) ..3, 4, 7, 8

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601 (1975) 3, 4, 7, 8

Ownbey v. *Morgan*, 256 U.S. 94 (1921) 3, 4

Sniadach v. *Family Finance Corp.*, 395 U.S. 337 (1969) 3, 4

Steinberg v. *Shields*, 38 Del. Ch. 319, 152 A. 2d 113 (1959) 6

Trans World Airlines, Inc. v. *Hughes*, 40 Del. Ch. 523, 185 A. 2d 762 (1962) 6

U. S. Industries v. *Gregg*, 348 F. Supp. 1004 (D. Del. 1972); 58 FRD 469 (1973) Memorandum, Opinion and Order (April, 1975) 3, 5, 7, 8

Statutes:

10 Del. C. §366 .....3, 4, 5, 6, 7, 8

Periodicals:

Folk, *Sequestration in Delaware: A Constitutional Analysis*, 73 Colum. L. Rev. 749 (1973) 5

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ON APPAEL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION TO DISMISS AND/OR TO AFFIRM

Appellee in the above entitled case moves to dismiss and/or to affirm on the grounds that the appellants have raised no substantial question and that the decision below is clearly correct.

Question Presented

Does the Delaware sequestration statute, which is invoked to obtain jurisdiction over non-resident present and former officers, directors and/or employees in a Delaware corporation, in order to adjudicate claims against them for misconduct in their corporate capacities for the benefit of the corporation, which authorizes attachment of the appellants' stock without notice and a prior hearing, but

which offers significant safeguards, comport with the due process requirements of the Fourteenth Amendment?

Addition to Appellants' Statement of the Case

In conjunction with plaintiff's verified complaint in which the merits of plaintiff's claim is contained, and in further support of plaintiff's application for an order of sequestration, plaintiff submitted, pursuant to Chancery Rule 4(db), an affidavit specifying:

(a) As to each nonresident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

Appellants Raise No Substantial Question and the Decision Below Is Clearly Correct

Recent decisions of this Court[1] make clear that procedures such as 10 Del. C. §366 which sanction the attachment of property without prior notice or hearing meet the due process test if implemented in "extraordinary situations" where sufficient pre-seizure and post-seizure safeguards are present. Plaintiff has ably demonstrated that this case is precisely the kind of "extraordinary situation" contemplated by this Court, and that numerous and sufficient safeguards are available to prevent abuse and to protect the defendants. Therefore, the defendants raise no substantial question and the decision below upholding the statute's validity is clearly correct.[2]

A. *This Case Presents an "Extraordinary Situation"*

At the outset we say that appellants' tortured attempt to beat *Ownbey* v. *Morgan*, 256 U.S. 94 (1921) into the ground as the heart of their appeal is misguided. While some portions of the *Ownbey* opinion might well be written differently today,[3] procedures there under attack go beyond those presented by this case. Nevertheless, the rationale underlying *Ownbey*, namely, a state's vital interest in securing jurisdiction over non-resident debtors, is still very

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[1] *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

[2] The Delaware statute here being challenged has also recently survived constitutional attack in the Federal Courts. *U.S. Industries* v. *Gregg*, 348 F. Supp. 1004 (D. Del. 1972); 58 F.R.D. 469 (1973); Memorandum Opinion and Order (April 1975).

[3] See *U.S. Industries* v. *Gregg, supra*, 348 F. Supp. at 1021.

much alive and is explicitly consistent with current pronouncements of this Court.[4] In this connection, the Court has twice noted that *Ownbey* was an example of an "extraordinary situation" which justified excusing notice prior to seizure because the facts there required protection to the state: the "attachment [in *Ownbey* was] necessary to secure jurisdiction in state court—clearly a most basic and important public interest". *Fuentes* v. *Shevin, supra,* 407 U.S. at 91, n. 23. No further review of *Ownbey* is called for by the facts of this case.

Quite aside from the current viability of *Ownbey* v. *Morgan, supra,* the provisions of the Delaware sequestration statute fit squarely within the criteria set forth in *Fuentes* v. *Shevin, supra,* for excusing notice prior to seizure. Firstly, in additon to the general public interest illustrated in *Ownbey* which is served by a statute which brings non-resident debtors within the court's jurisdiction, 10 *Del. C.* §366 serves a most important additional public interest—that of centering litigation concerning Delaware corporate law in the Delaware courts, which are in a "unique position to make an authoritative determination of 'housekeeping' issues and to grant complete relief". *Gordon* v. *Michel,* 297 A. 2d 420, 423 (Del. Ch. 1972)[5]

[4] *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) 91 n. 28 (1972); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 339 (1969); *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, 613 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601, 610 (1975) (Powell, J. concurring opinion); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974). The approval of *Ownbey* in *Fuentes* is underscored by the Court's disapproval, in the same footnote, of another case in which a pre-seizure hearing was excused, as well as by the reference to *Ownbey* by Mr. Justice Brennan in his opinion in *Calero-Toledo* v. *Pearson, supra,* 416 U.S. 663, 681, n. 13, where the Court upheld a seizure prior to notice which formed the basis for the assertion of *in rem* jurisdiction. 416 U.S. at 679 n. 13.

[5] The procedure here under attack is, in fact, most commonly implemented in stockholder and derivative actions. This case must therefore be distinguished from a situation where the claims asserted and the parties involved have no relationship with the forum. *Gordon* v. *Michel, supra,* at 421; Folk, *Sequestration in Delaware: A Constitutional Analysis,* 73 Colum. L. Rev. 749 (1973). Thus, while plaintiff here is an individual stockholder, he sues "for all others similarly situated" as contrasted with the plaintiff's claim in *Fuentes* v. *Shevin* where "no more than [a] private gain" was at stake. *U.S. Industries* v. *Gregg, supra; cf. Fuentes* v. *Shevin, supra.* In addition, the appellants are either present or former officers, directors and/or employees of the Delaware corporate defendant. They have directly participated in the wrongful conduct set forth in the pleadings, they have invoked the benefits of the Delaware laws, and are hardly foreigners to the State of Delaware.

B. *Pre-Seizure Safeguards are Present*

Secondly, unlike the statute invalidated in *Fuentes* v. *Shevin, supra,* where a clerk issued the order of seizure, 10 *Del. C.* §366 provides significant pre-seizure safeguards to protect against abuse. As stated by Vice Chancellor Brown, at A31:

> "The attachment powers of the state are not set in motion at the whim of the litigant. They are activated only by an order of this Court after it is satisfied that the plaintiff has demonstrated his right to invoke the sequestration statute so as to obtain jurisdiction over the non-resident defendant in an effort to get the merits of his case before the Court".

Before the Judge for consideration must be a verified complaint, see *Lebowitz* v. *Forbes Leasing & Finance Corp.,* 456 F. 2d 979, 981 (3d Cir. 1972), and an affidavit submitted by the plaintiff. These must contain the facts of plaintiff's claim against defendants, the fact of defendants' nonresidence, the facts concerning defendants' ownership of property in Delaware and the value of that property, and the

source of plaintiff's information[6]. This information supplies the court with a sufficient basis on which to determine whether the seizure complies with the tests already discussed, and hardly leaves the state "in the dark". See *Fuentes* v. *Shevin, supra,* at 93. As noted in *U.S. Industries* v. *Gregg, supra,* at 1022 n. 29:

> "Under the Delaware practice, a court presented with a motion for the issuance of a sequestration order may also determine from the complaint whether it is 'bona fide on its face', *Trans World Airlines, Inc.* v. *Hughes,* 40 Del. Ch. 552, 185 A. 2d 886 (1972), whether the action is of a kind where the exercise of *quasi in rem* jurisdiction is appropriate, *Steinberg* v. *Shields,* 38 Del. Ch. 319, 152 A. 2d 113 (1959), and whether the value of the Property to be seized bears a reasonable relation to the amount of the claim asserted. *Trans World Airlines, Inc.* v. *Hughes,* 40 Del. Ch. 523, 185 A. 2d 762, 765 (1962)".[7]

C. *Post-Seizure Safeguards are Present*

Appellants maintain, in addition to the lack of pre-seizure safeguards, that recent cases dictate that Delaware's sequestration statute be held unconstitutional for

[6] 10 Del. C. §366 also requires the plaintiff to post a bond to protect the sequestrator from damages due to wrongful sequestration. This provision adds an extra measure of safety to the more significant controls already noted.

[7] In *Fuentes, supra,* the Supreme Court indicated that any requirement that the plaintiff must put forth ex parte evidence in addition to the allegations in the complaint would provide only "illusory" protection to a defendant in that such evidence would not be subject to dispute by the defendant. To permit a contest on the merits prior to seizure would give the defendant an opportunity to transfer the property and thus frustrate jurisdiction. Thus 10 Del. C. 366 satisfies the remaining test set forth in *Fuentes,* namely, that the seizure will satisfy the need for prompt action.

lack of an immediate post-seizure hearing. *North Georgia Finishing, supra,* and *Garcia* v. *Krausse,* 380 F. Supp. 1254 (S.D. Tex. 1974). However, the requirement of an immediate post-seizure hearing is altogether inapplicable where sequestration is invoked solely to accomplish the valid governmental purpose of obtaining jurisdiction over non-resident defendants. The Court has, in the cases referred to by appellants, hand-tailored[8] the requirement of an immediate post-seizure hearing to prevent against any "initial error",[9] *North Georgia Finishing Co., Inc., supra,* at 608, in prematurely depriving a debtor (who is already within the Court's jurisdiction) of his property during the pendency of an action where his creditor's grounds are weak[10] that he is about to consume the property, abscond or otherwise frustrate the creditor's ultimate judg-

[8] Indeed, in *North Georgia Finishing* v. *Di-Chem, supra,* Justice Powell indicates in his concurring opinion, at 610, note 1, that the majority in that case (and perhaps in all related cases) was not directing its attention to sequestration which is designed to serve a jurisdictional functon and thus, was not passing on the required controls in such a case.

[9] With respect to 10 *Del. C.* §366 (which in this case is not invoked on the basis of any facts peculiar to the defendants which need to be proven), no such "initial error" is possible. *U.S. Industries* v. *Gregg, supra,* Memorandum Opinion and Order. This is because the sole reason for implementation of Delaware's sequestration statute in this case is to obtain jurisdiction over non-resident defendants and therefore, its usage "is not dependent upon the merits of the complaint as was true in *Fuentes* and *Mitchell*". (Opinion of Vice Chancellor Brown, A31). Rather, the sole relevant facts in moving for an order of sequestration are defendants' nonresidence and their ownership of property within the state. The only possible "initial error", therefore, is that plaintiff is incorrect in asserting that defendants are non-residents and that they own property within the state. However, as previously noted, sufficient safeguards are present prior to seizure to assure that these determinations are not left to the plaintiff.

[10] Where plaintiff's allegations of fraud are merely on information and belief, for example. See, *Carey* v. *Sugar, et al.,* —— U.S. ——, 44 L.W. 4416 (Mar. 25 1976).

ment. However, such a hearing would serve no purpose here where release of the defendants' property[11] is obtainable merely through defendants' appearance.[12]

The argument that Delaware's sequestration statute is unconstitutional because it lacks an immediate post-seizure hearing has recently been examined and rejected. Judge Stapleton, who wrote the original opinions in *U.S. Industries* v. *Gregg, supra,* which upheld the constitutionality of 10 *Del. C.* §366, was asked to reconsider his earlier opinion in light of *North Georgia Finishing, supra,* and *Garcia, supra.* He accepted the invitation to reconsider, but declined to reverse his opinion. Judge Stapleton agreed with appellee herein that a post-seizure hearing would serve no purpose.[13] While a post-seizure hearing of the type requested by appellants is not available, other ample procedures are available to protect the appellants, and these are set out by the Court below at A13-A17 and clearly provide a reasonable balancing of interests between these appellants and appellee.[14]

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[11] The make weight arguments raised concerning lack of jurisdiction over the appellants' stock certificates which are physically located outside Delaware are amply answered by the courts below. See A20-A21 and A27-A30.

[12] As soon as defendants appear they may immediately petition the Court for a release of their property, which will automatically be granted absent a showing by the plaintiff for a reason for continuation of the sequestration order.

[13] As noted in the opinion below, a form of post-seizure hearing is available upon appellants' petition for release at which time the merits of appellee's claims are examined. See A17-A18.

[14] See *Mitchell, supra.* This is so particularly in light of the need to encourage rather than discourage actions which seek to redress wrongs by those in control of corporate affairs. The need to balance appellee's need of access to a ready means of adjudicating its claims referred to above in one forum cannot be ignored. In other words, if the statute involved in this case is held invalid, stockholder and derivative actions will be for all practical purposes impossible to bring and thus appellee and others similarly situated will effectively be denied their right to a day in court. The suggestion by appellants that plaintiff be bound by the minimum contacts doctrine enunciated in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), rather than avail itself of the remedies afforded under the sequestration statute, is nothing more than an attempt to utterly frustrate plaintiff's access to a forum.

CONCLUSION

Accordingly, appellee contends that the appellants raise no substantial question and that the decision below is clearly correct. The Delaware Supreme Court has followed guidelines recently set by this Court and has, in addition, applied those guidelines with a sense of proportion to balance the particular type of competing interests involved in a case such as this. Therefore, appellee respectfully prays that its motion to dismiss and/or to affirm be granted.

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